No. 2573

In The United States Circuit Court of Appeals

for the Ninth Circuit

R. C. BELL and MARY A. BELL,
Appellants

VS.

MARY E. C. MORLEY and FRED MORLEY,
Appellees

Brief of Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

KOLLOCK & ZOLLINGER,
Solicitors for Appellants.

PLATT & PLATT,
Solicitors for Appellees.

PACIFIC BANKER

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Brief of Appellees

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

STATEMENT OF THE CASE

On the 22nd day of April, 1912, the appellees sold and conveyed to the appellants certain real property situated in Wahkiakum County, State of Washington, for the sum of thirty thousand dollars, of which seventy-five hundred dollars was paid in cash and the balance was covered by a series of promissory notes. One of these notes, bearing date April 22, 1912, was for the sum of fifty-six hundred

twenty-five dollars, payable twelve months after date, a copy of which note appears upon page 4 of the Transcript of Record. This note was secured by a mortgage dated the 22nd day of April, 1912, a copy of which mortgage appears in the Transcript of Record on page 5 thereof.

The case at bar was instituted by the appellees to foreclose this mortgage and collect the amount due upon this note. The complaint was in the usual form, alleging a breach of the conditions of the mortgage and praying for a foreclosure and sale as upon execution at law. In addition to the customary allegations of such a complaint, however, there appeared a further allegation setting forth a special provision of the mortgage to the effect that, if the mortgagors should desire to remove any timber before the payment of the notes secured by the mortgage, they should make a report in writing to the mortgagees before the 10th day of each month stating the amount of timber removed and should pay at the same time $2.50 per thousand feet for all timber cut during the month, as shown in such report. The complaint also alleged a breach of this provision of the mortgage, together with a statement that the mortgagors were insolvent, and the prayer of the complaint called for a temporary restraining order restraining the mortgagors from selling and conveying certain sawlogs in their possession which had been removed from the mortgaged premises. The injunction order was granted, and before filing their answer the appellants executed

and delivered to the appellees a stipulation and bond providing in substance that, in consideration of the release of the sawlogs from the temporary restraining order, the appellants, as principals, and the American Surety Company of New York, as surety, would abide by and pay any judgment or decree that might be rendered in favor of the appellees in the present case, and that a judgment and decree might likewise be rendered against the surety as well as against the principal. A copy of this stipulation and bond appears on pages 39 to 45, inclusive, of the Transcript of Record, as part of the evidence introduced by appellees upon the trial.

In answer to the allegations of the complaint, the appellees admitted the execution and delivery of the note and mortgage referred to; likewise, the non-payment of the amount due thereon; but denied the alleged breach of the other provisions of the mortgage as to failure of the appellants to make monthly reports concerning the amount of timber removed, and further denied that there was due from appellant, R. C. Bell, to the appellees any sum of money.

The answer further alleged, by way of separate answer and defense, that the mortgage sued upon was a purchase money mortgage and that in the negotiations antecedent to the sale the firm of James D. Lacey & Company, acting as the agents and representatives of the appellees, represented to appellant, R. C. Bell, by way of inducement to the purchase of the lands herein referred to, that they

had carefully and accurately cruised said property and that there was on said property, as shown by said cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good, merchantable timber; and further alleged that R. C. Bell accepted said representations as the representations of the owner of the property and believed the same and purchased the property and executed the promissory note and mortgage referred to in the complaint in reliance upon said representations and would not have purchased said property or executed said note and mortgage if he had not believed said representations; the answer further alleged that said representations were false, untrue and fraudulent, in that there was only 7,916,999 feet of timber, exclusive of hemlock, and that the appellants were damaged by such fraudulent representations in the sum of $9167.57, which sum the appellants sought to counterclaim against the amount of the note set forth in the appellees' complaint.

The answer also contained a second further answer and defense, to the effect that the conveyance from the appellees to the appellants contained, amongst other lands, the southeast quarter of the southeast quarter of section twenty-four, township ten north, range eight west of the Willamette Meridian, together with the right to remove the timber thereon within twenty years from the 8th day of August, 1906, and that neither at the time of the execution of the deed from the appellees to the appellants, nor at the time of the execution of the

mortgage set forth in the appellees' complaint, did the appellees have any right, title, or interest to this property and were unable to convey good title to R. C. Bell, and that, by virtue of such fact, R. C. Bell was unable to remove about 1,000,000 feet of timber and was, consequently, damaged in the sum of $2500.

The reply of the appellees admitted that the cruise made by James D. Lacey & Company showed 11,584,000 feet of timber, exclusive of hemlock, but denied all of the allegations of fraudulent representations, and alleged, by way of a separate reply, facts constituting an estoppel against the right of R. C. Bell to allege that he was damaged in any way by the failure of the appellees to give him title to the southeast quarter of the southeast quarter of Sec. 24, Tp. 10 N., R. 8 W. W. M.

This plea of estoppel recited that, prior to the consummation of the sale and purchase by and between the appellees and appellants, of the lands embraced in the deed of conveyance, and prior to the execution of the mortgage involved in this suit, the appellants knew and were advised of the fact that, through inadvertance and mistake, one of the predecessors in interest of the appellees had recorded his deed of conveyance in a book known as "Miscellaneous Records," instead of the record book called the "Record of Deeds," and were advised of the fact that the legal title to said timber was vested in the appellees, regardless of the fact that said deed had been inadvertantly and mistakenly recorded in "Miscellaneous Records"; and having

full knowledge of the existence of such facts, and having consulted an attorney at law concerning the legal effect of such facts, and acting with full knowledge of the existence of such facts, the appellants agreed to purchase the timber on said land from the appellees, upon condition, as agreed between the parties, that Harrison G. Platt and Robert Treat Platt furnish the appellant R. C. Bell with an agreement providing that they would protect the appellants against any claim which might be asserted against the title to said land on account of the fact that one deed in the chain of conveyances had been inadvertantly recorded in "Miscellaneous Records"; and that the appellants accepted the deed of conveyance covering this particular tract of land, together with the agreement from Harrison G. Platt and Robert Treat Platt, with full knowledge of the fact that said agreement was in lieu of a covenant of title to said land and was executed contemporaneously with the deed to said land and received by the appellees with full knowledge of the existence of said alleged defect of title, but with the understanding that the appellees were to be in this manner protected against any difficulties which might arise on account of said alleged defect.

The agreement referred to was in the alternative, providing either that Harrison G. Platt and Robert Treat Platt should protect the appellees against any attempted claim of title to the land or procure a deed for the appellants.

The estoppel referred to further alleged that a deed to the timber on this land had been procured and was held in the interest of the appellees, and further alleged that the appellees had never presented to the appellants any claim whatsoever that any person had asserted or attempted to assert any right against the title to the timber on said land.

The case came on regularly for trial, and after listening to the evidence of both parties the court found, as a matter of fact, that there were no false or fraudulent representations made by the appellees or their agents concerning the amount of timber on the land conveyed, and further found that the agreement to protect the appellants as to the title to a certain portion of the land was given for the purpose of handling the situation that confronted the parties, and that the bond and deed were to be construed together and the liability of the parties was to be determined by the arrangement upon which they had agreed.

Based upon these findings of fact, the court entered a decree of foreclosure and likewise entered judgment against the American Surety Company, as provided in the stipulation and bond upon which the parties had agreed at the time of releasing the logs from the temporary restraining order.

POINTS AND AUTHORITIES.

I.

Where, in a suit to foreclose a mortagage, a defendant seeks to abate the purchase price on the ground of fraud, the same rules apply as in an action for deceit.

Kingman & Co. v. Stoddard, 85 Fed. 740.

II.

In order to establish an action for deceit, the representations must have been knowingly false or so recklessly extravagant as to amount to fraud.

Pittsburg Life & Trust Co. v. Northern C. L. Ins. Co., 140 Fed. 888.

Hodgens v. Jennings, 148 App. Div. 879; 133 N. Y. Supp. 584.

Stolitzky v. Linscheid, 150 App. Div. 253; 134 N. Y. Supp. 805.

Hindman v. Bank, 112 Fed. 931; 50 C. C. A. 623.

Kumber v. Young, 137 Fed. 744.

Pomeroy's Equity Jurisprudence, Secs. 882, 883, 884, 885, 886, 887 and 888.

III.

Where a purchaser takes a deed without covenants, he has no right to retain purchase money, or recover it in case of payment, on account of defects in title.

Rawle on Covenants, Sec. 319.

Devlin on Deeds, Sec. 957.

Sutton v. Sutton, 7 Gratt. 238 (Va.).
Gouvenor v. Elmendorf, 5 Johns Chancery, 79.
Decker v. Shultze, 11 Wn. 47; 39 Pac. 263.

IV.

The findings of a court in a suit in equity must be taken as presumptively correct, and, unless an obvious error has intervened in the application of the law or some serious and important mistake has been made in the consideration of the evidence, such finding will not be disturbed by the appellate court.

Thorndyke v. Alaska Perseverance Mining Co., 164 Fed. 657, 665 (C. C. A., 9th Circuit).

Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 88 (C. C. A., 8th Circuit).

V.

Where the parties have employed express covenants in a deed, the law does not imply any covenants, especially where the express covenants of the deed and the implied covenants of law are inconsistent, in which instance the express covenants control.

Douglas v. Lewis, 131 U. S. 75; 33 L. Ed. 53.
Leddy v. Enos, 6 Wn. 247; 33 Pac. 508.
Glenn v. Baltimore, 10 Atl. 70 (Md.).
Dun v. Deitrich, 3 N. Dak. 3; 53 N. W. 81.
Finley v. Steele, 23 Ill. 56.
Stewart v. Anderson, 10 Ala. 504.

Winton v. Vaughan, 22 Ark. 72.

Morris v. Harris, 9 Gill. 19 (Md.).

Hoy v. Taliaferro, 16 Miss. (18 Smedes & M.) 727.

Duncan v. Lane, 16 Miss. (18 Smedes & M.) 744.

Witty v. Hightower, 20 Miss. (— Smedes & M.) 478.

Kent v. Welch, 7 Johns. 258; 5 Am. Dec. 266.

VI.

Fraud is never presumed, but must be clearly made out. The false representation must be material and must be acted on in the belief of its truth. If the purchaser investigates for himself and nothing is done to prevent a full investigation, he cannot say that he relied on the vendor's representation.

Farrar v. Churchill, 135 U. S. 609; 34 L. Ed. 247, 250.

VII.

The Federal courts take judicial notice, without plea or proof, of the laws of every state of the United States.

Lamar v. Micou, 114 U. S. 218; 29 L. Ed. 94, 95.

VIII.

The rule that the law of the state where the land lies governs the interpretation of a deed does not warrant the implication of personal covenants not authorized by the law of the state where the deed was made.

Worley v. Hineman, 6 Ind. App. 240; 33 N. E. 260.

Bethell v. Bethell, 54 Ind. 428.

Jackson v. Green, 112 Ind. 341; 14 N. E. 89.

Phelps v. Decker, 10 Mass. 275.

ARGUMENT.

The present appeal presents for determination the correctness of the trial court's findings and the correctness of the legal principles which the court applied to the facts found.

The first issue presented was the question of alleged fraudulent representations by the appellees to the appellants concerning the amount of timber upon the lands conveyed and covered by the mortgage sued upon in this case. In other words, the defense proceeded upon the theory that if, in the sale of real property between the appellants and the appellees, the appellees made certain fraudulent representations upon which the appellants relied, to their damage, the appellants could, in a suit to foreclose the mortgage given to secure the notes issued as part of the purchase price, offset any claim for damages they might have on account of such fraudulent representations. The accuracy of this theory as a general proposition was not disputed by the appellees, but its application to the facts of the present case was denied, and the appellees' position in this particular was in effect sustained by the trial court.

A careful reading of the answer filed in the case at bar will disclose no allegations that the appellees falsely and fraudulently misrepresented the amount of timber on the land, but that the appellees represented they had made a cruise and the cruise showed a certain amount of timber. The language referred to is as follows:

> "* * * to induce said defendant to purchase the same and to execute the note and mortgage described in the complaint, as and for the purchase price thereof, the said James D. Lacey and Company represented to the said defendant, R. C. Bell, that they had carefully and accurately cruised said property, and that there was on said property, as shown by said cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good and merchantable timber."
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> (Page 26, Transcript of Record.)

The James D. Lacey & Company referred to were the agents of the appellees in negotiating the sale.

It will be observed, as already stated, that the language of the answer above quoted charges the agents of the appellees with having represented that they had carefully and accurately cruised said property and that there was on said property, as shown by the cruise, a certain amount of timber.

From the beginning to the end of the trial, the appellees objected to the introduction of any evidence as to alleged fraudulent representations concerning the amount of timber upon the land conveyed, upon the ground that the answer had speci-

fically limited the claim of the appellants to the contention that the appellees had represented that the cruise which they had made showed so many feet of timber, and that the only evidence of fraud which would be admissible under such an allegation would be evidence to show that the appellees had fraudulently made an improper cruise and presented it to the appellants, or that they had made one cruise and then presented to the appellants an entirely different cruise showing more timber than the actual cruise showed. No evidence of this character was offered, and no contention of this kind was made. Furthermore, Mr. Bell himself, one of the appellants, testified that, in a conversation with Mr. Langille, the authorized representative of James D. Lacey & Company, he stated to Mr. Langille, while being shown the cruise which James D. Lacey & Company had made, that he presumed that was a fair, careful estimate, with a fair overrun, and that he further stated to Mr. Langille as follows:

> "'If you tell me that it will run 12,000,000 feet, I will give you thirty thousand dollars; I will give you two dollars and a half per thousand and will throw out the hemlock.' He (Langille) said, 'I believe it will run twelve million feet; it has been cruised conservatively.'"
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> (Transcript of Record, pages 48, 49.)

This, as we recall, was the only evidence of any fraudulent representations which was offered by the appellants on the trial of this case, and it will

be observed, from a reading of the testimony referred to that James D. Lacey & Company, acting through Mr. Langille, merely expressed the belief that the timber would run 12,000,000 feet and did not guarantee or attempt to guarantee that it would absolutely run 11,584,000 feet or any other amount. In fact, Mr. Bell himself further testified that, prior to buying this tract, he had done considerable logging in that vicinity and, although he had not been on this particular tract, he had seen it, showing that he had full opportunity to investigate the premises; and Mr. Langille testified, as shown on page 77 of the Transcript of Record, that he described the land to Mr. Bell and that Mr. Bell stated to him that he was more or less familiar with this country and had some general knowledge of the tract in question, at which time Mr. Bell also stated to him that he intended to look the property over with his foreman; and, as appears from the evidence shown on page 79 of the Transcript of Record, Mr. Langille also testified that at subsequent interviews with Mr. Bell he asked Mr. Bell if he had looked over the property, and Mr. Bell stated that he had. Again, as shown on page 83, of the Transcript of Record, Mr. Langille testified as follows:

> "We had a good deal of talk relating to the values of the timber and I made it very clear to Mr. Bell at all times that we were selling him so much land for so much money. That we were not undertaking to guarantee our

cruise. We never guaranteed any cruise. We simply represent it according to our cruise. That is all we can do, because no man can guarantee a cruise."

(Transcript of Record, page 83.)

Mr. Langille also testified, as shown on page 77, of the Transcript of Record, *that the cruise which he showed Mr. Bell was the same cruise upon which the appellees had purchased the property.* The only other evidence of Mr. Bell's action with reference to relying on this cruise is the admission of Mr. Langille, as shown on page 79 of the Transcript of Record, that Mr. Bell stated to him that he was not going to cruise the property but was going to rely upon the cruise of James D. Lacey & Company.

Furthermore, counsel for the appellants, in his closing argument, made the following statement:

"I would say that we have not alleged here intentionally any actual fraud on the part of James D. Lacey & Company and cannot now charge any such fraud. We attempted to draw our pleadings and present the case as we thought the facts to be, neither the defendant nor myself, as his attorney, believed there was any actual fraud on the part of James D. Lacey & Company, particularly on the part of Mr. Langille, their representative and manager. * *

"The testimony here shows, and I presume it is a matter of common knowledge, that no logger could operate on a shortage of 25 per cent or 20 per cent from the estimate on which

he purchased the property and that a company with the reputation of James D. Lacey & Company, and their business, if it be true that their cut underruns 25 per cent or 20 per cent in this particular case would be chargeable with such gross disregard as to whether or not the facts are true which are stated, that it might be held as fraud in law, but I disclaim any intention to charge actual fraud, or actual intention to deceive on the part of that company."

(Transcript of Record, pages 114 and 115.)

In addition to the testimony above set forth, the appelles offered the testimony of W. G. Collins and Arthur Thrane, the gentlemen who actually made the cruise which Mr. Langille showed to Mr. Bell, and they testified in detail as to the care with which the cruise was prepared, and also testified that the said cruise was honestly made and made according to the established and best known methods of cruising. This testimony appears on pages 85 to 94, inclusive, of the Transcript of Record. Both of these gentlemen qualified as having had considerable experience in the cruising business, and no attempt was made to question their standing or their character.

It was alleged in the complaint, and the appellees offered considerable testimony to establish the fact, that the logging carried on by the appellants upon the land in question was not carried on according to careful and recognized methods of logging and that, as a result, the appellants had failed to procure from the lands in question the

full amount as shown by the cruise, owing to their extravagant and wasteful methods.

The appellees also established, by Messrs. Langille, Collins, Thrane, Croman, King, and Van Orsdal, that there exists in the trade of timber cruising a general custom which recognizes the existence of a standard of variance between the amount of timber shown by a cruise and the amount of timber which could be removed by reasonable and careful methods of logging, and that such standard permits a variation of at least ten per cent. In other words, it seems to be understood in the timber cruising business, according to this testimony, which is undisputed, that a cruise is merely an estimate, worked out on as nearly an accurate basis as is possible, and that the actual amount of timber may easily vary from this estimate ten per cent, without seriously affecting the value of the estimate in the trade of timber cruising. That is, if a man experienced in the timber business were to make a purchase based upon a cruise, he would not treat the cruise as an exact estimate of the timber but consider as a matter of experience that the actual number of feet might vary as much as ten per cent from the amount shown on the estimate.

Based upon this evidence and the admissions of counsel for the appellants, the court found as follows regarding the question of fraudulent representations:

"I find there was no representation of the fact made by Mr. Lacey on behalf of the plaintiffs in this case, regarding the amount of timber there was on this land. The only representation of fact made was that the cruise had been made of the land, timber on the lands, for the purpose of purchase when the Morleys acquired the lands; coupled with the expressed opinion, when asked how much it would overrun the cruise, that it would run as much as twelve million feet.

"There being no direct and positive representation of fact as to the amount of timber on the land, the court must go further and see what other things are involved in the case.

"Counsel in his closing argument appeals to the standing of these people as cruisers. There was not any such confidential relation existing between the defendants Bell and the Lacey Company (James D. Lacey & Company), as to warrant Bell in placing any particular reliance on the expression of their opinion as he would upon the opinion of somebody he had hired or his own agent.

"There is no evidence to support a finding that the expression of belief was so reckless and grossly exaggerated as to warrant the court in finding there was actual intent to deceive.

"Then we come to this cruise upon which he bases his opinion and the evidence in the case seems to indicate that it was made according to the accepted method of cruising by men who are unimpeached and who are experienced, and the court finds that there is nothing in the case to warrant the assumption that

> Mr. Langille was careless in expressing that opinion, let alone the court being able to find that it is clearly and satisfactorily established as asserted that there was fraud. A mere preponderance of the evidence is not sufficient where fraud is charged or something tantamount to fraud."
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> (Transcript of Record, pages 115 and 116.)

The findings of fact made by the court are well supported by the evidence, and, as already stated, the only charge in the pleadings was that the appellees had shown to the appellants a cruise, accompanied with the representation that such cruise had been carefully and accurately made and that as shown by said cruise there was 11,584,000 feet of timber, exclusive of hemlock.

The principles of law applied by the court to these facts seem to be the only remaining question upon this branch of the case, and the rules of law adopted by the court are of such a well-recognized and primary character that we have encountered considerable difficulty in finding any adjudications upon the subject.

In the case of *Kingman & Co. v. Stoddard,* 85 Fed. 740, the Circuit Court of Appeals for the Seventh Circuit made the following observation in reference to the right of a purchaser to plead fraud by way of defense to an action for the contract price of the article sold. While the immediate case before the court was an action at law for deceit, the following observation is of value in establishing

a standard by which to determine the character of evidence necessary to establish fraud as a defense in an action for the contract price:

> "The remedy by way of defense is allowed to avoid circuity of action, and it is grounded upon and is governed by the same principles as the action for deceit. If the one cannot prevail, the other must fall. If the one can be sustained, the other is upheld. Judgment in the one case is *res adjudicata* and concludes the right. *Burnett v. Smith,* 4 Gray, 50."
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> *Kingman v. Stoddard,* 85 Fed. 740, 750.

According to the rule above announced, it would seem that the defense of fraud, where a party is seeking a counterclaim based on fraudulent representations, as against the amount due as the purchase price of an article sold, is governed by the same rules as those which govern an action for deceit, and that the same allegations are, therefore, necessary. The party defending as against the purchase price, on the ground of fraud, is in an entirely different position from a party seeking rescission on the ground of fraud. In the case of the rescission of a contract, the party claiming to have been defrauded tenders back the subject-matter of the sale and asks to have the parties placed in the same position they were before the alleged false representations were made. In the case of a defense and counterclaim against the contract price of an article sold, however, the defendant seeks to retain the subject-matter of the sale and at the same time

to obtain a reduction in the purchase price on the ground of alleged fraudulent representations.

That is exactly the case at bar, and in such cases, where the party is retaining the subject-matter of the sale and has derived benefits from the sale, a much higher degree of proof is necessary than in those cases where the party offers to return the subject-matter and rescind the contract. This is undoubtedly the basis of the rule above announced, that the rules applicable to an action for deceit are likewise applicable to a defense of fraud in an action for the contract price. In other words, if the party who claims to have been defrauded sets up such fraud in an action on the contract price, he is proceeding on exactly the same theory as if he had originally instituted an action for damages on account of deceit, and instead of appearing as a party plaintiff in an action he is permitted to defend and counterclaim those damages against the amount due on the original contract price.

Proceeding upon the theory that a defense seeking to abate a part of the purchase price on account of fraudulent representations in the procurement of the sale is governed by the same rules as an action for deceit, we turn for a moment to a few of the adjudications setting forth the necessary elements of an action for deceit. The following authorities establish that an averment and proof of scienter is necessary in order to establish fraud and deceit.

In the case of

Pittsburg Life & Trust Co. v. Northern C. L. Insurance Company, 140 Fed. 888,

which was an action at law for deceit, it was held that such an action is based on fraud and that to sustain it there must not only have been false representations, but, contrary to the rule in suits for rescission, they must have been made fraudulently and intentionally or must have been made so recklessly and without regard to their truthfulness as to be equivalent to actual fraud. The court said:

> "Disposing of this branch of the case before proceeding to another, it is to be noted that the plaintiffs are not suing on the agreement, to have the defendants make good the insurance reserve, which it might possibly be claimed, notwithstanding the figures there found, that they were bound for; although they are in reality asking damages, in a way, quite foreign to the action, that would effectively do so. Neither are they seeking to set the agreement aside, on the ground of material misrepresentation; to which relief they might possibly be entitled. They hold to the bargain, but claim that they were overreached and cheated in making it, which must therefore be established in order to entitle them to a verdict. This is the gist of the action, and as a clear apprehension of it is necessary to a correct disposition of the case, let us look at some of the authorities.
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> "'The action for deceit at common law,' says Lord Fitzgerald in *Derry v. Peek,* L. R. 14 App. Cas. 337, 'is founded on fraud. It is essential

to the action that moral fraud should be established, and since the case of *Collins v. Evans,* 5 Q. B. 804, 820, in the exchequer chamber, it has never been doubted that fraud must concur with the false statement to maintain the action. It would not be sufficient to show that a false representation had been made. It must further be established that the defendant knew, at the time of making it, that the representation was untrue, or, to adopt the language of the learned editors of the Leading Cases, that 'the defendant must be shown to have been actually and fraudulently cognizant of the falsehood of his representation, or to have made it fraudulently without belief that it was true.' In the same case it is said by Lord Herschel:

" 'I think the authorities established the following propositions: First, in order to sustain an action of deceit there must be a proof of fraud, and nothing short of that will suffice; secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false.'

"So in *Lord v. Goddard,* 13 How. 198, 14 L. Ed. 111, it is said by Mr. Justice Catron:

" 'The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means intention to deceive. If there was no such intention; if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue.'

"Similarly, it was declared in *Union Pacific R. R. v. Barnes,* 64 Fed. 80, 12 C. C. A. 48, that an action of deceit 'requires for its foundation a false statement knowingly made, or a false statement made in ignorance of, and in reckless disregard of its truth or falsity, and of the consequences such a statement may entail. The evil intent—the intent to deceive—is the basis of the action.' And in *Hindman v. Bank,* 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108, it is said by Judge Lurton:

" 'Before the plaintiff can recover in an action of deceit he must prove two things: That the representation was false; and that the person making it knew it was false. * * * Such an action differs essentially from one brought for rescission of a contract on the ground of misrepresentation. In the latter kind of suit it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentation, however honestly made, it cannot stand. But when the action is for fraud and deceit, it is not enough to show that the representation was untrue, for, if it was honestly believed to be true, that is a good defense.'

"It is also well said by Judge Hook, in *Kimber v. Young,* (C. C. A.), 137 Fed. 744:

" 'The basis of the action of deceit is the actual fraud of defendant—his moral delinquency; and therefore his knowledge of the falsity of the representation, or that which in law is the equivalent thereto, must be averred and proved. There is much confusion in the authorities upon this subject, due in part to the er-

roneous assumption, that that which is merely of evidence of fraud is equivalent to the ultimate fact which it tends to prove, and also to the assumption, likewise erroneous, that an untrue representation which would be sufficient to support a suit in equity for a rescission of a contract is equally as available in an action of deceit.'

"The law as thus laid down is well settled, however it may not be kept in mind in some of the cases; and confusion only arises where it is departed from. The question is whether anything within it is made out here. Clearly not, so far as respects any positive intent to deceive. It is not claimed, for instance, that the officers of the defendant company got up a deceptive list of policies for Mr. Dawson to make his computation upon, in order to secure a better bargain than they otherwise could. The list which was used was made out long before the parties came together, and entirely independent of that fact, for the purpose of having the opinion of Mr. Dawson as consulting actuary with regard to the condition of the company. And the same is true with respect to the computation based upon it, except only as to the extensions for July business. It is impossible from this to make out anything like intended fraud.

"Admitting this to be so, however, the plaintiffs contend, that knowing that reliance was being placed upon the list, the officers of the defendant company were bound to see that it was correct, and are to be judged the same as though they asserted that it was; of which, if they had no actual knowledge, they are convicted

of such recklessness as amounts to fraud. It is no doubt true, that a false statement, recklessly made, without knowledge of its truth or falsity, is the equivalent of actual fraud, being the same in effect as if uttered knowingly. Story, Eq. Juris. Sec. 193; *Cooper v. Schlesinger,* 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; *Hindman v. Bank,* 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; *Kimber v. Young* (C. C. A.), 137 Fed. 744. Care must be taken, however, in enforcing this rule; having regard to the alternative for which it stands. It is not every misstatement that amounts to a cheat and a fraud. These are strong terms, implying moral obliquity, and are not to be lightly applied. To be so characterized, the statement or representation must not only be untrue, but must be made without concern whether it is or not, and consideration must therefore be given to the circumstances under which it is made."

Pittsburg Life & Trust Co. v. Northern C. L. Ins. Co., 140 Fed. Rep. 888.

In the case of

Hodgens v. Jennings, 133 N. Y. Supp. 584,

it is said:

"The second subdivision of the first defense is also insufficient in law, for the reason that, while it undertakes to set up false representations made by plaintiff to induce defendant to purchase the receiver's certificates for which the note in suit was given, there is no allegation that these representations were false to the knowledge of plaintiff when made, and scienter is one of the necessary elements of fraud.

Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651."

Hodgens v. Jennings, 148 App. Div. 879, 133 N. Y. Supp. 584.

Again:

"But we are of the opinion that the facts stated in the counterclaim are insufficient to sustain an action for damages for deceit, because there is no allegation that plaintiff, when he made the statement as to the size of the lot and of the house thereon, knew that such statements were false, or, in ignorance of the truth or falsity thereof and indifferent as to the fact, made such statement recklessly, paying no heed to the injury which might ensue. Such an allegation, or an allegation that the statement was fraudulently made, is absolutely essential. Bradbury on Rules of Pleading, 329; *Kountze v. Kennedy,* 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *McIntyre v. Buell,* 132 N. Y. 192, 30 N. E. 396; *Inderlied v. Honeywell,* 88 App. Div. 144, 84 N. Y. Supp. 333; *Carr v. Sanger,* 138 App. Div. 32, 122 N. Y. Supp. 593. For anything that appears in the statement of facts constituting the counterclaim, plaintiff, in good faith, and in an honest, although mistaken, belief as to its true dimensions, represented to defendant that the house was 20 feet in width, instead of 18 feet. It may be urged that this is improbable, in view of the fact that plaintiff now claims that he never intended to convey a lot more than 18 feet wide; but the sufficiency of the counterclaim must be determined by the allegations contained therein, and, so tested,

within the rule above stated, these are insufficient."

Stolitzky v. Linscheid, 150 App. Div. 253, 134 N. Y. Supp. 805.

To the same effect are,

Derry v. Peek, L. R. 14 App. Cases 337.

Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623.

Kimber v. Young (C. C. A.), 137 Fed. 744.

In Pomeroy's Equity Jurisprudence, it is said:
Sec. 882:

"III. Untruth of the Statement.—The statement of fact must be untrue, or else there is no *misrepresentation.* The entire doctrine of the law and of equity concerning that species of fraud which consists in *suggestio falsi* is based upon the assumption that the representation is in fact untrue, as this very name itself shows. This is the premise of fact which is assumed in every case which discusses the nature of fraud, and decides whether it does or does not exist in any particular instance. This requisite element needs, therefore, no examination and no citation of special authorities; it is not susceptible of any exception or limitation."

Sec. 883:

"IV. The Intention, Knowledge, or Belief of the Party Making the Statement.—This element—the mental state or condition of the party making the representation—is the most important and characteristic feature of fraud, both in equity and at law. It is, moreover, that constituent of fraud with respect to which there ex-

ists the principal difference or divergence between the theory which prevails in equity and that which forms a part of the law. It will aid us, therefore, in obtaining a more accurate notion of the equitable conception by comparison, to present a very brief summary of the doctrine on this subject which has been settled by courts of law."

Sec. 884:

"The Knowledge and Fraudulent Intention Requisite at Law. The court of queen's bench at one time maintained, in a series of decisions, the following doctrines: Whenever one party to a transaction, A, made a representation of fact which was in reality untrue, and the other party, B, relied upon the statement, and was induced by it to do or to omit something, and thereby suffered some damage, such representation was fraudulent, and A was liable for his actual fraud, even though he had made the statement without any knowledge of its untruth,—his liability was independent of his knowledge or ignorance of its actual falsity. This theory admitted the possibility of fraud at law where there was no moral delinquency; it denied that moral wrong was an *essential* element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American states. These cases have, however, been overruled, and the theory itself has been abandoned, in England, and even generally, if not universally, throughout the states of our own country. It is now a settled doctrine of the law that there can be no fraud, misrepresentation, or conceal-

ment without some *moral* delinquency; there is no actual *legal* fraud which is not also a *moral* fraud. This immoral element consists in the necessary guilty knowledge and consequent intent to deceive,—sometimes designated by the technical term, the *scienter*. The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time when he makes it. It is well settled that fraudulent misrepresentations may assume the three following forms or phases at law: 1. A party making an untrue statement has at the time an actual, positive knowledge of its falsity; he states what he absolutely knows to be untrue. This is the simplest, plainest, and most direct species of fraud. 2. A party making an untrue statement does not at the time have any belief that it is true. The making an untrue statement, of the truth of which the party of course has no knowledge, and which he does not even believe to be true, is tantamount to the making of a statement which the party knows to be untrue. 3. Finally, a party making an untrue statement, having at the time no knowledge whatever on the subject, *and no reasonable grounds to believe it to be true,* is guilty of fraud, and his claiming that he believed it to be true cannot remove its fraudulent character. A definite statement of what the party does not know to be true, where he has no reasonable grounds for believing it to be true, will, if false,

have the same legal effect as a statement of what the party positively knows to be untrue. In each of these three phases there is a *moral* wrong, and a very slight, if any, difference in degree of the culpability. In each there is actual knowledge of the untruth, or else the law conclusively imputes knowledge to the party, and treats him as though actually possessing it."

Sec. 885:

"Knowledge or Intention Requisite in Equity.—There are undoubtedly some authorities which, taken literally, would make *moral* wrong a necessary ingredient of fraud in equity as well as at law, since they require a guilty knowledge of the untruth as an essential element. This view is, however, certainly incorrect. It is fully settled by the ablest courts, English and American, that there may be actual fraud—not merely constructive fraud—in equity without any feature or incident of *moral* culpability; that the actual fraud consisting of misrepresentation is not necessarily immoral. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity. Whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther, and includes instances of fraudulent misrepresentations which do not exist in the law. There are, however, well-established limits to this equitable conception, which should be carefully observed. Every wrongful act, even by persons in positions of trust and confidence, which gives occasion for

a remedy is not fraudulent. Breaches of their duty by persons in fiduciary relations, acts of agents in excess of their authority, and the like, are not, as such, instances of actual fraud, although they may sometimes fall within the division of 'constructive fraud.' I shall, in further illustration of this subject, enumerate and describe the different phases and forms of fraudulent misrepresentations recognized by equity, some of them being identical with those found in the law."

Sec. 886:

"Forms of Fraudulent Misrepresentations in Equity.—1. Where a party makes a statement which is untrue, and has at the time an actual, positive knowledge of its untruth, and the necessarily resulting intent to deceive,—the *scienter* at law. This is the most direct, and in some respects the highest, form of fraud. Wherever the facts of the statement are the acts of the very party making it, which are represented as having been done by him, if the statement is untrue, the knowledge of its untruth is necessarily and conclusively imputed to the party. In all cases involving such kind of misrepresentation, if knowledge of the untruth be a requisite element of the liability, such knowledge will be conclusively presumed. In suits involving misrepresentations of this form, if the party charged with the fraud is examined as a witness in his own behalf, the better rule is, that he cannot be asked, as a part of his examination in chief, whether or not he believed his representation to be true. 2. If a person makes an untrue statement, and has at the time no knowledge of its

truth, and even has no *belief* in its truth, he is chargeable with fraud in equity as well as in law. Making a statement which the party does not believe to be true is only slightly removed in culpability from the making a statement which the party knows to be false.

"Sec. 887. The Same. 3. Where a person makes an untrue statement, and has at the time no knowledge of its truth, and there are no reasonable grounds for his believing it to be true, he is chargeable with fraud, although he had no absolute knowledge of its untruth, and may claim to have had a belief in its truth. This is a mode in which the rule is ordinarily laid down by courts of law, and sometimes by courts of equity. The equity cases have, however, settled the rule in somewhat broader terms, omitting entirely the qualification 'that there are no reasonable grounds for the person's believing his statement to be true.' In other words, it is settled in equity by an overwhelming array of authority that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effects to the assertion of something which the party knows to be untrue.

"Sec. 888. The Same.—4. *Where a person makes a statement of fact which is untrue, but at the time of making it he honestly believes it to be true, and this belief is based upon reason-*

able grounds which actually exist, the misrepresentation so made is not fraudulent either in equity or at law. This general proposition is subject, however, to the two following important limitations: 5. Where such an untrue statement is made in the honest belief of its truth, so that it is the result of an innocent error, and the truth is afterwards discovered by the person who has innocently made the incorrect representation, if he then suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in equity, a fraudulent representation, even though it was not so originally. 6. Finally, if a statement of fact, actually untrue, is made by a person who honestly believes it to be true, but under such circumstances that the *duty* of knowing the truth rests upon him, which, if fulfilled would have prevented him from making the statement, such misrepresentation may be fraudulent in equity, and the person answerable as for fraud; forgetfulness, ignorance, mistake, cannot avail to overcome the pre-existing *duty* of knowing and telling the truth."

Again:

"The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on

which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material. If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations. *Southern Development Company v. Silva,* 125 U. S. 247 (31:678). 'If the party to whom the representations were made,' remarked Lord Langdale, in *Clapham v. Shillito,* 7 Beav. 149, 'himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.' "

Farrar v. Churchill, 135 U. S. 609, 34 L. Ed. 246, 250.

Viewing the facts found by the court in the light of these rules, we find an absolute absence of necessary allegations in the pleadings and of necessary proof in the evidence. There is no allegation and there is no evidence that the appellees or their agents, James D. Lacey & Company, ever made or attempted to make any fraudulent representations

concerning the amount of timber upon the lands which they sold, or that they ever made any representations whatsoever with an intention to deceive. On the contrary, counsel for appellees, as already shown, stated in his argument as follows:

> "I disclaim any intention to charge actual fraud, or actual intention to deceive on the part of that company."
>
> (Transcript of Record, page 115.)

Furthermore, as already stated, the only allegation of the pleading is that the appellees, acting through James D. Lacey & Company, represented to appellants that they had made a careful and accurate cruise of the timber on the land which they sold, and the undisputed evidence presented upon the trial of this case is that the cruise which they did show to Mr. Bell prior to the making of the sale was actually made by competent and experienced cruisers, whose integrity and standing is unquestioned and whose statement that a cruise is but an estimate and may easily vary at least ten per cent from the actual amount of timber on the ground is likewise unquestioned. In addition to this, Mr. Bell himself testified that Mr. Langille merely expressed to him the belief that the timber might run in excess of the cruise and did not dispute the statement of Mr. Langille, so far as we have been able to find, to the effect that Mr. Langille made clear to Mr. Bell that the appellees were selling so much land for so much money and were not undertaking to guarantee the cruise. (Transcript of Record, page 83.)

In view of this evidence and of the rules of law above set forth, we think that the court's findings and decision upon the branch of the case relating to the defense of fraudulent representations are completely substantiated by the facts established in this particular case and by the rules of law announced in analagous cases.

Furthermore, it is an established and well recognized rule that the findings of a trial court will be given great weight by the appellate court. This rule is based upon the well recognized principle that the trial court has a greater advantage in seeing the witnesses themselves and their manner of testifying and in determining the general attitude of the parties in relation to a controversy. This rule is peculiarly applicable to a case like the one at bar, where there is a charge of misrepresentation on one side or the other in relation to the dealings between the parties. In transactions involving the sale of property, it is very easy for a purchaser whose speculation has not been all that he anticipated to charge the seller with misrepresentations in order to escape the payment of the purchase price, and in determining the existence or non-existence of such alleged misrepresentations it is almost necessary for the tribunal chosen to determine the controversy to see the parties themselves and judge of their demeanor, as well as to hear the evidence which they have to offer. This advantage, of necessity, rests entirely with the trial court and gives to his findings great value.

The following decisions very clearly state the rule as to the efficacy of a trial court's findings in equity cases:

> "Whatever conflict there is in the evidence was resolved against the plaintiffs by the judge of the court below, whose findings are in cases like the present always to be taken as 'presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings should not be disturbed.' *North American Exploration Co. v. Adams,* 104 Fed. 404, 45 C. C. A. 185; *Tilghman v. Proctor,* 125 U. S. 136, 8 Sup. Ct. 894; 31 L. Ed. 664; *Kimberly v. Arms,* 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Furrer v. Ferris,* 145 U. S. 134, 12 Sup. Ct. 821, 36 L. Ed. 649."
>
> *Thorndyke v. Alaska Perseverance Mining Co.,* 164 Fed. 657, 665 (C. C. A. 9th Circuit.)

Also:

> "The court below found that this transaction was a loan, and not an extension of the time of payment of the premium. The legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts. *Stearns-Roger Mfg. Co. v. Brown,* 114 Fed. 939, 943, 52 C. C. A. 559, 563; *Kinloch Tel. Co. v. Western Electric Co.,* 113 Fed. 659, 51 C. C. A. 369; *National Hollow Brake Beam Co. v. Interchangeable Brake-Beam Co.,* 106 Fed. 693, 716, 45 C. C.

A. 544, 567; *Mann v. Bank,* 86 Fed. 51, 53, 29 C. C. A. 547, 549; *Tilghman v. Proctor,* 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms,* 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Furrer v. Ferris,* 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; *Warren v. Burt,* 58 Fed. 101, 106, 7 C. C. A. 105, 110; *Plow Co. v. Carson,* 72 Fed. 387, 388, 18 C. C. A. 606, 607; *Trust Co. v. McClure,* 78 Fed. 209, 210, 24 C. C. A. 64, 65; *Exploration Co. v. Adams,* 104 Fed. 404, 408, 45 C. C. A. 185, 188."

Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 88 (C. C. A. 8th Circuit).

Turning now to the second defense pleaded in the case at bar, which relates to the alleged failure of title to a certain portion of the land conveyed, we are again confronted with the proposition of determining the trial court's decision as a correct finding of fact and conclusion of law.

The deed given by the appellees to the appellants contained the following covenants:

"To have and to hold the above granted and described premises, described in paragraph 'a' foregoing, unto the said R. C. Bell, his heirs and assigns forever. And we Mary E. C. Morley and Fred Morley, her husband, grantors above named, do covenant to and with R. C. Bell, the above named grantee, his heirs and assigns, that grantor Mary E. C. Morley is lawfully seized in fee simple of that portion of the above granted premises described in paragraph 'a' foregoing, which said premises are free from all encumbrances suffered or created by the said Mary

> E. C. Morley, and that the timber on said land described in paragraph 'b' foregoing is free from all encumbrances created or suffered by said Mary E. C. Morley, and that we will and our heirs, executors, and administrators, shall warrant and defend the above granted premises, described in paragraph 'a' foregoing, and every part and parcel thereof against the lawful claims and demands of all persons whomsoever claiming by, through, from or under us, or either of us, and the said timber described in paragraph 'b' foregoing, and with the right to remove the same within twenty (20) years from August 8th, 1906, against the lawful claims and demands of all persons whomsoever claiming by, through, from or under us, or either of us."

Paragraph "a" in the above covenant refers to property the title to which was not in dispute. Paragraph "b" refers to the timber as to which it is claimed that the title failed. As already stated, the basis of the alleged failure of title was that one of the intermediate grantees, prior in time to the appellees, recorded his deed in the "Miscellaneous Records" of Wahkiakum County, Washington, whereas the same should have been recorded in the regular record of deeds.

A careful reading of the above covenants discloses that they were only special covenants and would simply subject the appellees to an action for damages if failure of title was occasioned by the acts of the appellees or those claiming under them. As already stated, however, the alleged failure of title involved in this case was caused by a grantee

prior in time to the appellees. The deed upon which appellants base their alleged claim of failure of title contains no express covenant of seizin or of general warranty. In fact, the answer filed by the appellants, as shown on pages 27 and 28 of the Transcript of Record, fails to allege any breach of covenant and contains merely the general allegations that the appelles did not have any title to the property in question and therefore did not convey any.

All evidence relating to the alleged failure of title was objected to by the appellees upon the ground that there was no pleading to support the contention, but the trial court admitted the evidence regardless of this fact. Counsel for the appellants made no application for leave to amend his pleading, either before or after the proof, regardless of the objection raised, but, as already shown, such application would have been of no avail because the deed in question contained no express covenant of seizin or of general warranty. Therefore, no allegation could have been made as to a breach of any such covenant; and there existed no implied covenants of law, because the parties themselves had adopted certain express covenants of special warranty, limiting their liability. The numerous cases supporting the rule that no implied covenants exist where the parties have adopted certain express covenants are cited in this brief under paragraph V of Points and Authorities. The following language, used by Chief Justice Fuller, quoting with approval from a decision of the Missis-

sippi Supreme Court, very accurately and concisely states the rule in this particular:

> " 'The covenants raised by law from the use of particular words are only intended to be operative where the parties themselves have omitted to insert covenants. And where the party declares how far he will be bound to warrant, that is the extent of his covenant.' "
>
> *Douglas v. Lewis,* 131 U. S. 75, 33 L. Ed. 53.

Regardless of this fact, however, there were certain circumstances peculiarly applicable to this individual case which virtually disposed of the appellants' contention as to failure of title, independently of any technical contention regarding the question of covenants or breach of covenants, and the trial court based its decision as to the appellants' contention regarding this question of title on this peculiar state of facts.

As already stated, the appellees pleaded, by way of estoppel, that the question concerning the title to this particular property was made known to the appellants prior to the consummation of the transaction between the parties. Mr. Kollock, the attorney for Mr. Bell, very frankly stated, in his testimony, on page 73 of the Transcript of Record, that Mr. Bell had full knowledge of the question of the alleged defective title before the transaction was closed and consulted Mr. Kollock to ascertain if any arrangement could be made so that he could go ahead and close the deal regardless of the alleged defective title:

> "He asked me if any arrangements could be made by which he could go ahead and close the deal irrespective of the defective title. He had full knowledge of the title."
>
> Transcript of Record, page 73.

With this knowledge in his possession, supported and amplified by the advice of his own attorney, Mr. Bell proceeded with the closing of the deal and accepted from the appellees an agreement which provided that Harrison G. Platt and Robert Treat Platt would procure title for Mr. Bell or protect him against any damages which might be asserted on account of his proceeding to cut the timber on this particular tract; and Mr. Kollock again very frankly stated, as shown on pages 70 and 71 of the Transcript of Record, that the matter of this agreement was taken up with him and he advised Mr. Bell that Messrs. Platt & Platt were financially responsible and that the acceptance of this agreement was entirely satisfactory to him. In other words, it is admitted upon the face of the record in this case that Mr. Bell, with his eyes open and with full knowledge of the alledged defective title, proceeded with the purchase of the property in question, having this knowledge in his possession, and accepted from the appellees a deed containing no covenant of seizin and no covenant of general warranty, but, on the contrary, a deed which had only a special covenant against any acts of the appellees themselves or those claiming under them, and in conjunction with this deed accepted an agreement that as to the particular

tract the title to which was in question he would rely upon the agreement of Messrs. Platt & Platt either to procure a deed for him or else to protect him against any claim which might be made against him on account of the removal of the timber. The appellees contended, and still contend, that this agreement was accepted by the parties in lieu of any covenant in the deed as to seizin or as to warranty of title, and the trial court held these instruments—that is, the bond and the deed,—should be construed as one transaction, giving as a reason for his ruling that, as appeared from the undisputed evidence, Mr. Bell was very anxious to purchase and the appellees did not want to bind themselves absolutely to make good something of which they were not sure, and that under these circumstances the parties agreed upon the method adopted. The court's ruling in this particular can hardly be questioned, because, as stated, it was based upon the undisputed evidence of the case and was merely giving legal effect to the transaction which the parties themselves had originally created and finally acted upon. It certainly follows that a court of equity, in view of such facts, could not now permit Mr. Bell, after having taken possession of the property in question and after having had the opportunity to remove the timber on this particular tract, to come into court and seek to abate the purchase price on an alleged technical failure of title of which he had full and absolute knowledge at the time when the deal between the parties was closed.

Furthermore, as already stated, the undisputed evidence discloses that title was subsequently procured and that there existed no reason whatsoever to prevent Mr. Bell from removing the timber in question.

In view of the circumstances of this case and the evidence adduced, we respectfully urge that the trial court's finding as to the absence of any false representation should be sustained and that the trial court's holding in regard to the question of alleged defect of title should likewise be affirmed.

The appellants in their brief contend that under the statutes of the State of Washington the deed given in this case contained by implication a statutory covenant that the grantor was seized of an indefeasible title in fee simple, free from incumbrance done or suffered from the grantor. This is the first time the question has been presented by the appellants. During the trial of this case, the appellees objected to the introduction of any evidence on the question of defective title, upon the ground that the answer of appellants contained no allegation of breach of covenant, and that in cases of the sale of real property there exists no implied warranty of title and the parties are held entirely by the covenants in their deed. (Transript of Evidence, pp. 51, 52, 53.) Appellees also moved to strike out all of the evidence offered upon the question of defect of title, upon the same and other grounds (Transcript of Evidence, pp. 74, 75). In other words, the appellees resisted at every opportunity any evidence upon

this branch of the case, owing to the fact the appellants had alleged no breach of covenant, either express or implied.

As already stated, however, the appellees take the position that covenants are never implied where the parties themselves have adopted certain specific covenants in the deed. In the case of *Barlow v. Delaney,* 40 Fed. 97, cited on page 27 of Appellants' Brief, appears the following statement:

> "If from the force of the covenant it is desired to eliminate known defects or to limit the covenant in any way, it is easy to say so."

This states in concise language the position of the appellees upon this question of implied covenants in the deed now before the court, and appellees contend that the insertion of a special covenant of warranty accompanied by the specific agreement of the parties relative to the alleged defective title, made and executed before the deed itself, established a practical construction of the deed involved in this case, showing that the parties themselves intended to limit the liability of the appellees or grantors.

In the absence of this specific agreement, however, which undoubtedly makes the present case peculiar to itself, the general rule of law seems to be that, while the law of the state where the land is located governs the interpretation of the deed, it does not warrant the implication of personal covenants not authorized by the law of the state where the deed was made, and the deed involved in this case, as

shown upon its face, was signed and acknowledged by the grantors in Michigan and delivered by their attorneys, Platt & Platt, to the grantee in Oregon. This question was not argued to the trial court because the same was not raised by the appellants, and, as already stated, the appellants made no effort to amend their pleading so that the matter could be directly presented by the appellees in spite of the fact, as already stated, that the appellees objected throughout the trial to the admission of evidence upon this question.

The following authorities support the rule just referred to:

> "From these cases we give it as our opinion that the following propositions of law are established: (1) The covenant of seisin, to the extent of fixing the plaintiff's right to recover for a breach thereof, is one that runs with the land; and, if the property has been conveyed by the original grantee, the right to maintain an action for the breach of such covenant passes to the last grantee, his heirs or executors. (2) Whether a deed executed in Indiana, conveying land in another state, contains a covenant of seisin that runs with the land, is a question to be decided by the law of Indiana. If we are correct in these two propositions, it follows, as a necessary corollary, that in any action for a breach of covenant contained in a deed made in this state to real estate lying in another state, the question whether there is or is not a covenant that runs with the land must be settled according to the laws of this state."

Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260.

"The question arises, whether a deed, executed in Indiana, between her citizens, for land in another state, but containing no covenants whatever by the law of Indiana shall be construed as containing, by implication, such covenants as would, by the law of the state where the land lies, be regarded as contained in the deed.

"This is an interesting, and a somewhat novel question. We have been furnished with able briefs by counsel for the respective parties, who have cited the general authorities upon the point, but yet no case has been found entirely in point.

"There can be no doubt that the law of Missouri, alone, can be looked to in order to determine whether the deed in question was sufficient to pass the title. In the sale and conveyance of real estate, so far as regards the capacity of the parties to convey and hold, respectively, the formalities necessary to a valid transfer, the dominion and enjoyment of the same by the vendee, and the right of succession thereto, and all other incidents to the acquisition of the land, the *lex rei sitae* governs.

"But it does not, therefore, necessarily follow that the *lex rei sitae* so far governs conveyances made elsewhere, as to change their character as mere conveyances and invest them with the character of personal covenants not necessary to the transmission of the property."

and, after reviewing several authorities, the Indiana court concluded as follows:

> "As the deed was executed in Indiana, and as the parties resided therein, it would seem that they accepted the law of Indiana as the exponent of the rights conferred and obligations imposed thereby, beyond the mere passing of the title."
>
> *Bethell v. Bethell,* 54 Ind. 428, 23 Am. Rep. 650.

A careful reading of the case last cited will also disclose that the plaintiff in said case, the same being an action for breach of covenant, specifically pleaded breach of an implied covenant in the deed. To the same effect are:

> *Jackson v. Green,* 112 Ind. 341, 14 N. E. 89.
>
> *Phelps v. Decker,* 10 Mass. 275.

As already stated, while the deed involved in this case conveyed property located in the State of Washington, the deed itself was executed and acknowledged in Michigan and delivered in Oregon, and where delivery of an instrument is necessary to the consummation of a contract between parties it seems to be universally held that the place of delivery is the place where the contract is made.

> "*Place of Delivery.* There are many contracts, however, that are not complete and binding obligations until the actual delivery of the contract itself or the thing bargained for. Where this is true the place of delivery is the place of the contract, irrespective of the place where it was dated or signed. A note signed by a member of a partnership in the partnership name, but which is not delivered until after the dissolution

of the firm, cannot be received as a partnership obligation."

Elliott on Contracts, Sec. 1117.

The statute of the State of Oregon, wherein the deed involved in this case was delivered, provides as follows:

"Sec. 7105. *No covenants are implied in a conveyance.* No covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not."

Lord's Oregon Laws, Sec. 7105.

The Federal courts will take judicial notice of the Oregon statute just cited:

"The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof."

Lamar v. Micou, 114 U. S. 218, 29 L. Ed. 94, 95.

We, therefore, respectfully submit that, regardless of the particular facts of this case relating to the execution of a separate independent agreement between the parties, specifically establishing their own construction as to the liability of the grantors under the deed of conveyance, the general rules of law above cited make inoperative the statutes of Washington to insert by implication a covenant in the deed involved in this case, which was executed and delivered in a state where no covenants are implied, and we further urge, as already contended, that, as shown

by the following authorities, no covenant would be implied, even in the State of Washington, where the parties themselves have adopted covenants of their own:

> "Anders, J.—It is only necessary for us to decide one of the questions presented by the record in this case, and that is as to the sufficiency of the complaint. The case was brought to recover damages for a breach of the covenants of a deed made by appellant to the respondent. There was no special covenant against incumbrances in said deed. The only covenant relied upon and set out in the complaint was substantially as follows: * * *
>
> "The alleged breach of covenant was the fact that certain taxes assessed by the City of Seattle and the County of King upon the land conveyed were due and unpaid, and the damages sought to be recovered were on account of the payment of such taxes. It is contended on the part of the appellant that the covenant above set out was simply one for quiet enjoyment and not one against incumbrances, and that since the only breach assigned was the existence of an incumbrance on the property the complaint upon its face showed no violation of the covenants of the deed. That the covenant is not one against incumbrances is conceded by respondent, if the language is to be construed without any aid from our statute. She contends, however, that as such statute provides that a deed which is made in the form prescribed therein, shall be construed as a warranty deed carrying implied covenants as provided for in said statute, one of which is against incumbrances, this deed must

be construed as though such covenant had been expressed therein.

"We are unable to agree with this contention. It is evident that this deed was not drawn in view of such statute, and not being so drawn the implied covenants provided for therein would not obtain. By virtue of the statute certain covenants were implied from the use of the word warrant in a deed. But these covenants were to be implied only when there were none expressed. But where, as in this case, the grantor, instead of simply using the word 'warrant' and leaving the statute to define what should be implied thereby, goes farther and sets out the particular thing or things which he will warrant against, he cannot be held to have intended other covenants than the ones thus set out."

Leddy v. Enos, 6 Wash. 247, 33 Pac. 508.

The decision last cited seems conclusive upon this question and substantiates the trial court's ruling as a proposition of general law. In addition to this general rule, we have the benefit of the immediate facts of this case, showing the practical construction placed by the parties upon the covenants of the deed which was executed and delivered, finding from these facts that both parties, having knowledge of an alleged defective title, proceeded with the consummation of the transaction conveying this title, by adopting a method which specifically limited the grantors' liability on the one hand and protected the grantee against possible contingencies which might arise upon the other hand. The covenants of special war-

ranty inserted in the deed by the parties themselves, and the practical construction placed upon those covenants by the execution and delivery of the bond for the purpose of protecting the grantee eliminate the necessity of any implied covenants, and to imply any covenants would be to change the contract which the parties themselves agreed upon.

Furthermore, the deed from the appellees to the appellants conveyed the title which the appellees possessed, and there was no evidence offered by the appellants to show that they were ever disturbed in the enjoyment of this title by the assertion of an adverse right. There was no evidence offered to disprove the fact that the subsequent grantees of the property did not have actual knowledge of the title which had been conveyed to the appellees, and it affirmatively appears from the face of the evidence that the appellees have procured a deed perfecting the title to the land in question. In view of such facts, the appellants should certainly be precluded from asserting that they were unable to cut the timber upon this tract of land because of any defect in the title.

Respectfully submitted,

PLATT & PLATT,
Solicitors for Appellees.